Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." As the court of appeals expressly acknowledged, this case presents two questions "that have split the circuits" for more than a decade, namely:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

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PETITION FOR WRIT OF CERTIORARI

Ms. Pat Osborn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App. 1a-11a) is reported at 422 F.3d 359. The opinions of the District Court for the Western District of Kentucky (App. 12a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known and cited as the "Westfall Act" (App. 26a-30a).

The immediately pertinent part of the Act, codified at 28 U.S.C. § 2679(d)(2), provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be

substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

STATEMENT OF THE CASE

1. On a narrow peninsula in western Kentucky, between Lake Barkley to the east and Kentucky Lake to the west, sits the Land Between the Lakes National Recreation Area ("LBL") operated by the U.S. Forest Service. At all relevant times, respondent Barry Haley was a Forest Service employee at LBL; respondent Gaye Luber was the executive director of respondent Land Between the Lakes Association, Inc. ("LBLA"), a private contractor that provided the Forest Service with staff for gift shops, visitor centers, and interpretive areas at LBL. Until petitioner was terminated in the events that gave rise to this case, she was an employee of LBLA. *See generally* App. 3a, 20a-21a.

2. Petitioner sued Luber and LBLA in Trigg County (Kentucky) Circuit Court, alleging that she was discharged in violation of public policy. *See* App. 21a. In the same action, petitioner also sued Haley for wrongfully interfering with her employment relationship with LBLA, alleging that "Haley influenced LBLA . . . to fire her after she had a run-in with Haley." App. 3a. If this allegation is true, Haley's conduct violated "policies [that] prohibited Forest Service employees like Haley from 'participat[ing] in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees.'" *Id.* (alterations in original). Indeed, the United States (which is representing Haley) has "conceded that if Haley induced [petitioner's] firing, he acted *outside* the scope of his employment." *Id.* (emphasis added).

Despite this concession, the Attorney General—acting via the local United States Attorney, *see* 28 C.F.R. § 15.4(a) —issued a "certification that Haley had been acting *within* the scope of his employment at the time of the incident giv-

ing rise to [petitioner's] allegations." App. 3a (emphasis added). Based on this certification, and invoking the Westfall Act, 28 U.S.C. § 2679(d)(2), the United States removed the state-court litigation to the District Court for the Western District of Kentucky. *See* App. 3a. In that court, and again invoking the Act, the United States sought to substitute itself for Haley and, thereafter, to dismiss the case based on petitioner's failure to exhaust her administrative remedies under the Federal Tort Claims Act. *See* App. 3a, 19a.

To reconcile the apparent contradiction between the concession that Haley's alleged conduct was "outside" the scope of his federal employment and the certification that Haley in fact acted "within" the scope of such employment, the United States simply "denied . . . that Haley interfered with [petitioner's] continued employment" at all. App. 3a; *accord* App. 13a-14a ("Haley has signed a declaration stating that he had no communication with [Luber] regarding the decision to fire [petitioner]."). In other words, the Attorney General essentially issued—and removal was premised upon—"a Westfall Act certification that denie[d] the occurrence of any injury-causing event." App. 2a.

3. In reviewing that certification for purposes of the United States' motion to substitute itself for Haley, the district court pointed to "a dispute among the circuits—which the Sixth Circuit has not yet addressed—about how courts should deal with Westfall Act certifications based on an argument that no harm-causing incident ever took place." App. 14a. On the one side, the "First Circuit, in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993), per then-Chief Judge (now Justice) Breyer," held that "'the [Attorney General's certification] cannot deny the occurrence of the basic incident charged.'" App. 14a (quoting 995 F.2d at 1124). *Wood* reasoned that "permitting 'a Westfall Act certificate simply to deny that anything occurred would extend a form of [official] immunity well outside the "respondeat superior" context to "egregious" torts allegedly committed at work,'" and it would permit the "'Attorney General and district judge

(rather than the jury) to decide whether allegations of such non-work-related torts were true or false.'" App. 14a (quoting 995 F.2d at 1128).

On the other side, observed the district court, the "D.C. Circuit rejected the First Circuit's analysis in *Wood* . . . and concluded that the district courts must, if necessary, resolve the merits of the underlying dispute, i.e., whether or not the harm-causing incident took place, even if doing so ousts [the plaintiff's] right to a trial by jury." App. 15a (citing *Kimbro v. Velten*, 30 F.3d 1501, 1508-10 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995)); *accord id.* (citing *Melo v. Hafer*, 13 F.3d 736 (3d Cir. 1994), as having adopted "the approach advocated by the dissenters in *Wood* and by *Kimbro*"). The district court "conclude[d] that the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications." App. 16a. Accordingly, the court denied the Government's motion to substitute. *See id.*

"Having concluded that the United States [was] not a proper party to this case," the district court confronted the question whether to remand the action to state court. App. 24a. Observing that "[t]he Sixth Circuit has not spoken to this issue and the authority among other circuits is split," the court decided that the Westfall Act "'does not bar this Court from remanding an intentional tort action against a federal employee after it has been determined that the employee was not acting within the scope of her employment'" and also that "'remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c).'" App. 24a (quoting *Allstate Insurance Co. v. Quick*, 254 F. Supp. 2d 706, 725, 729 (S.D. Ohio 2002)). Accordingly, the district court remanded the action to the Trigg County Circuit Court. *See* App. 17a.

4. The United States appealed. (All circuits agree that orders remanding Westfall Act actions are appealable notwithstanding the seemingly categorical language of 28 U.S.C. § 1447(d).) The Court of Appeals for the Sixth Circuit began its opinion by observing that it confronted two

"issues that have split the circuits," namely: (1) "the procedural ramifications attendant to a Westfall Act certification that denies the occurrence of any injury-causing event"; and (2) "the jurisdictional consequences of a denial of substitution under the Act." App. 2a.

As detailed below, the court of appeals disagreed with the district court on both issues. As to the first, the Sixth Circuit "join[ed] the majority of the circuits addressing the issue in holding that where the Attorney General's certification is based on a different understanding of the facts than is reflected in the complaint, including a denial of the harm-causing incident, the district court must resolve the factual dispute." App. 8a (citation omitted). Therefore, the district court was directed to "resolve the factual disputes underlying the scope [of Haley's federal employment], including whether the alleged incident occurred" as it was described in petitioner's complaint. App. 11a.

As to the second issue, the Sixth Circuit "agree[d] with the majority view that the clear language of the [Westfall] Act forecloses remand" to state court. App. 10a. Therefore, "[e]ven if the district court finds that Haley acted outside the scope of his employment, it must nonetheless retain jurisdiction over this case." App. 11a.

REASONS FOR GRANTING THE PETITION

As the court below acknowledged, the federal courts of appeals are self-consciously split over (1) whether the Westfall Act authorizes the Attorney General to issue "incident-denying" certifications, and (2) whether the Act forecloses a district court from remanding an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act. These acknowledged conflicts in the lower courts have persisted for more than a decade and are obviously entrenched. Because the instant case presents the two issues in simple and stark form, it is an excellent vehicle for finally resolving the long-standing splits on the questions presented.

I. As the Court Below Expressly Acknowledged, the Circuits Are Split on the Authority of the Attorney General to Issue "Incident-Denying" Certifications Under the Westfall Act.

1. Here, the United States "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." App. 3a. At the same time, however, the United States "denied . . . that Haley interfered with [petitioner's] continued employment." *Id.* In essence, therefore, the Attorney General issued what the Sixth Circuit called a "Westfall Act certification that denie[d] the occurrence of any injury-causing event," App. 2a, or more succinctly, an "incident-denying" certification, App. 5a.

How have the courts of appeals grappled with incident-denying certifications? As told by the court below, *see* App. 4a-7a, the story centers largely on the exhaustive analysis by then-Chief Judge Breyer for the en banc First Circuit in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993), and it extends to other courts' reactions to that analysis. We thus begin with the First Circuit's analysis of incident-denying certifications.

Wood involved state-law claims for assault, battery, and civil rights violations brought by the plaintiff against her former supervisor, a federal military officer; in essence, the plaintiff alleged that the defendant sexually harassed her on the job. *See id.* at 1123-24. The Attorney General issued a Westfall Act certification nominally asserting that the defendant was, at all relevant times, "acting within the scope of his office as a commissioned officer of the Armed forces of the United States." *Id.* at 1124. But in substance, the certification simply "den[ied] that any relevant incident had occurred," and the defendant's accompanying affidavit likewise "simply denied [the plaintiff's] factual allegations." *Id.* Indeed, as in the present case, *see* App. 3a, "the government did not deny that the acts would have fallen outside the 'scope of employment' had they occurred" as alleged by the plaintiff. 995 F.2d at 1124.

Wood framed the resulting legal issue as follows:

> This appeal focuses on whether the Attorney General may issue a Westfall Act certificate that simply denies that any injury-causing action occurred. Suppose a plaintiff claims that a federal employee committed acts clearly outside the scope of employment, as here, where the plaintiff has alleged sexual harassment amounting to "assault and battery." Can the Attorney General certify that there simply was no such event? To rephrase this question using the statutory terms [from 28 U.S.C. § 2679(d)(1) and (2)]: Can the certificate grant immunity simply by denying the occurrence of any "incident out of which the claim arose?" Would such a certificate fall within the scope of the immunity statute?

995 F.2d at 1124.

Chief Judge Breyer's comprehensive opinion for the en banc court answered all these questions emphatically in the negative. The opinion systematically examined the specific language of § 2679(d), the surrounding statutory scheme of the Westfall Act and the Federal Tort Claims Act, the purpose of federal employee tort immunity, the history of the Westfall Act, and recent judicial precedent. *See* 995 F.2d at 1124-29. The end result: "We therefore conclude that the certificate cannot assert 'immunity' simply by denying that anything occurred. We read the statute to mean what its words naturally say, namely that the Attorney General's certificate must assume the existence of an 'incident out of which the claim arose.'" *Id.* at 1128-29 (quoting 28 U.S.C. § 2679(d)(1) & (2)).

As stated above, the First Circuit took account of then-recent precedent in concluding that the Westfall Act does authorize the Attorney General to issue "incident-denying" certifications. *See id.* at 1128. At the appellate level, that precedent consisted solely of the Second Circuit's decision in

McHugh v. University of Vermont, 966 F.2d 67, 74 (2d Cir. 1992), which held that in making a certification under the Westfall Act, the Attorney General "may not deny that acts were within the scope of employment by denying that the acts occurred."[1]

2. In conflict with these decisions of the First and Second Circuits are several decisions that "expressly or impliedly reject the *Wood* majority's approach." App. 7a. The Third Circuit "respectfully disagree[d] with the *Wood* court and conclude[d] that the Attorney General may file a scope of employment certificate based on a finding that the defendant did not engage in the conduct alleged by the plaintiff." *Melo v. Hafer*, 13 F.3d 736, 746 (3d Cir. 1994); *accord id.* at 747 (holding that the Attorney General may file a Westfall Act certification even in "cases in which the plaintiff alleges conduct which is beyond the scope of the defendant's employment, but which the Attorney General determines did not occur").

The Eighth Circuit similarly "decline[d] to follow the holding in *Wood*"; instead, it "agree[d] with the dissenting judges in *Wood* (and with relevant cases from other courts) that nothing in the Westfall Act gives the district court the authority to refuse to substitute the United States on the ground that either the government or the employee denies the offensive conduct." *Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996). Finally, the D.C. Circuit "disagree[d]" with *Wood* because "the statutory language describing certification does not preclude a disavowal through certification that the harm-causing event actually occurred." *Kimbro v. Velten*, 30 F.3d 1501, 1507-08 (D.C. Cir. 1994), *cert. denied*,

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[1] The only other direct precedent was a decision of a district court in the Tenth Circuit, which similarly found invalid a Westfall Act certificate that was "limited to conveying [the defendant's] denial of engaging in [the alleged tortious] conduct." *Jackson v. United States*, 751 F. Supp. 911, 912 (D. Colo. 1990). The Tenth Circuit itself has not had occasion to address the issue.

515 U.S. 1145 (1995). To the contrary, as that court read the Westfall Act, "it does not matter . . . what the certification actually says—*i.e.*, whether it denies or recharacterizes the plaintiff's allegations of the employee defendant's conduct." *Id.*

3. There are good reasons to conclude that the Sixth Circuit chose the wrong side of the above-documented split. Judge Breyer's opinion in *Wood* sets forth these reasons in comprehensive fashion. Petitioner would draw attention to three doctrinal developments that postdate that opinion.

a. In this Court's one sustained consideration of the "statutory fog" of the Westfall Act, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425 (1995), a four-Justice plurality confronted what the amicus curiae called "a potentially serious Article III problem." *Id.* at 434. The plurality denied the gravity of the alleged problem, reasoning as follows:

> Whether the [defendant] employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. Because a case under the Westfall Act thus "raises [a] question of substantive federal law at the very outset," it "clearly 'arises under' federal law, as that term is used in Art. III."

Id. at 435 (citation omitted) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)).

Of course, a scope-of-employment determination cannot raise a "question of substantive federal law" if it raises no question of *law* at all. Yet the "incident-denying" certifications authorized by the Third, Sixth, Eighth, and D.C. Circuits lead inevitably to purely *factbound* determinations by the district court. *Kimbro*, for example, called upon the trial court to credit either (1) the plaintiff's allegation that the defendant employee "without provocation . . . viciously struck [her] on the right arm," or (2) the employee's "sworn

declaration claiming that she did not recall ever touching" the plaintiff. 30 F.3d at 1502. Here, the issue is whether "Haley influenced LBLA . . . to fire [petitioner] after she had a run-in with Haley." App. 3a. It is difficult to see how any of these factual issues is a "nonfrivolous federal question" or a "question of substantive federal law," as those terms were used by the *Lamagno* plurality.[2]

b. In its briefing below, the United States correctly argued that the official immunity conferred by the Westfall Act "closely resembles the qualified immunity from constitutional torts" considered in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Proof Brief for Defendant-Appellee Barry Haley at 16; *see also id.* (referring to "the closely related area of qualified immunity in suits for constitutional torts"). The point of the argument was that "a court must determine the immunity granted under the Westfall Act 'at the earliest possible stage,' i.e., 'long before trial.'" *Id.* at 16-17 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). This point is a sound one, but the further implication suggested by the United States—that the immunity determination includes pretrial resolution of basic merits facts—is assuredly not.

To the contrary, qualified immunity doctrine implies precisely the opposite. Thus, in *Johnson v. Jones*, 515 U.S. 304, 313 (1995), the Court considered "the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." The Court unanimously ruled that this kind of order is *not* appealable. The Court's first reason for so ruling goes to the nature of

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[2] To be sure, the four dissenters in *Lamagno* criticized the above-quoted reasoning by the plurality on the ground that it took too expansive a view of "Arising Under" jurisdiction. *See* 515 U.S. at 441-43 (Souter, J., dissenting). How much more would the dissent criticize a federal court's assuming jurisdiction over case merely to engage in mundane resolution of factual disputes on the order of "I didn't do it"?

the immunity determination: "a qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Id.* (alterations in *Johnson*) (quoting *Mitchell*, 472 U.S. at 530 n.10). Thus, "an appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Id.* (quoting *Mitchell*, 472 U.S. at 528). That is so because "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." *Id.* at 314 (quoting *Mitchell*, 472 U.S. at 527).

These principles have obvious application here. When the Attorney General issues an incident-denying certification, the majority rule requires the district court to "resolve the factual dispute" about the merits of the case in order to grant or deny Westfall Act immunity. App. 8a; *accord* Proof Brief for Defendant-Appellant Barry Haley at 22 (arguing that "the district court had to address"—at the *immunity* stage—"whether Haley committed the acts alleged in the complaint"). Such a requirement cannot be squared with *Mitchell*'s and *Johnson*'s precepts that immunity is "a legal issue that can be decided with reference only to undisputed facts," that a court considering immunity "need not consider the correctness of the plaintiff's version of the facts," and that "immunity is conceptually distinct from the merits."

c. This Court returned to the relationship between an immunity defense and the merits of the plaintiff's claim in *Crawford-El v. Britton*, 523 U.S. 574 (1998). The Court distinguished between the "plaintiff's showing of improper intent (a pure issue of fact)" and "the separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question.'" *Id.* at 589 (quoting *Mitchell*, 472 U.S. at 526). Moreover, the Court observed that it "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." *Id.* (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). The Court also reiterated that in

order to resolve an immunity defense, a district court "must determine whether, *assuming the truth of the plaintiff's allegations*, the official's conduct violated clearly established law." *Id.* at 598 (emphasis added).

If, as the United States argues, Westfall Act immunity is "closely related" to qualified immunity, then it would be anomalous for district courts to determine the former without assuming the truth of the plaintiff's allegations, at least as to the existence of the very incident on which liability is premised. But by definition, incident-denying certifications do just that. Such certifications, moreover, necessarily entail an inquiry into "pure issue[s] of fact" that underlie the plaintiff's cause of action rather than the "essentially legal question[s]" that are the hallmark of immunity defenses.

Therefore, the Court should take up the first question presented and resolve the split over the Attorney General's authority under the Westfall Act to issue incident-denying certifications.

II. As the Court Below Also Acknowledged, the Circuits Are Split on Whether Westfall Act Actions May Be Remanded to State Court.

1. Having resolved the certification issue, the court below considered the remand issue: "Defendants additionally argue that even if the district court correctly denied the United States' motion to substitute, it erred in remanding the case to state court." App. 8a. The court of appeals observed that this position "attracted four of the five . . . justices joining the majority opinion in *Lamagno*." *Id.* In the Sixth Circuit's view, that four-Justice plurality concluded that "a district court retains jurisdiction under the Westfall Act even if [the court] ultimately refuses to substitute the United States as a defendant." *Id.*

Although *Lamagno* itself was a case originally filed in federal court under the diversity jurisdiction, the plurality nevertheless addressed the remand issue in Part IV of its opinion: it is "reasonable and proper for the federal forum

to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest." 515 U.S. at 436. The four dissenting Justices, on the other hand, found "a serious problem . . . in requiring a federal district court, after rejecting the Attorney General's certification, to retain jurisdiction over a claim that does not implicate federal law in any way." *Id.* at 441 (Souter, J., dissenting). That is, retaining jurisdiction in these circumstances "invite[d] a difficult and wholly unnecessary constitutional adjudication about the limits of Article III jurisdiction." *Id.* at 443-44. Though otherwise joining the plurality to make a majority on the main issue, Justice O'Connor did not join Part IV of the plurality's opinion, splitting the Court four to four on the remand issue.

2. This split, as the court below described in detail, *see* App. 9a-10a, is mirrored in the courts of appeals. Largely based on § 2679(d)(2)'s final sentence—"This certification of the Attorney General shall *conclusively* establish scope of office or employment for purposes of removal" (emphasis added)—the Third, Fourth, and Fifth Circuits have ruled that a remand to state court is not authorized, regardless of how the district court decides the scope-of-employment question. *See Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir.), *cert. denied*, 510 U.S. 817 (1993); *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996).

Pointing to an "analogous" (if not strictly applicable) provision of the Westfall Act—"If, in considering the [defendant employee's] petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court," § 2679(d)(3)—the First Circuit and the D.C. Circuit have ruled precisely the opposite. *See Nasuti v. Scannell*, 906 F.2d 802, 814 (1st Cir. 1990) ("If the district court finds that [the defendant employee] was acting *outside* the scope of his employment, it shall remand the

case back to the state superior court."); *Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995) (concluding that the Westfall Act "requires the district court to remand a Section (d)(2) case to state court, even though Section (d)(3) is the only provision that explicitly compels it to do so").

The Eleventh Circuit has taken yet another position—in the middle. In *Green v. Hill*, 954 F.2d 694 (11th Cir.), *on reh'g*, 968 F.2d 1098, 1098 (11th Cir. 1992), the action was sent back to the district court for a determination "whether the alleged assault and battery was work related." If that court determined that "the acts occurred outside the scope of employment"—that is, certification was improper—then it was "within the district court's discretion to continue its jurisdiction over the case and adjudicate the controversy"; alternatively, "the court "may elect to remand the assault and battery issue to the state court." *Id.* at 1098-99, *cited in Clamor v. Karagiorgis*, 191 F. Supp. 2d 1186, 1192 (D. Haw. 2002) ("This court need not determine whether it has the power to remand. It concludes only that it is not required to remand.").[3]

3. As noted above, the court below "agree[d] with the majority view that the clear language of the Act forecloses remand," such that "the district court lacked authority to remand the action." App. 10a. Also as above, there are good reasons to conclude that the Sixth Circuit came down on the wrong end of the three-way split.

a. The D.C. Circuit observed that remanding cases where the defendant employee is determined to have acted

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[3] For completeness' sake, we note that in *Clamor v. United States*, 240 F.3d 1215, 1218-19 (9th Cir. 2001), the Ninth Circuit acknowledged the split on the remand issue but chose to let the district court address the issue "in the first instance."

Having concluded that an incident-denying certification did not satisfy the Westfall Act, a district court in the Tenth Circuit remanded the action to state court. *See Jackson v. United States*, 751 F. Supp. 911 (D. Colo. 1990).

outside the scope of his federal employment is "consistent with [federal courts'] responsibility to construe statutes to avoid constitutional questions." *Haddon*, 68 F.3d at 1427 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)). That is, "[p]ermitting a federal court to retain a case after determining that no federal issue or diversity of citizenship exists would, as a majority of the Supreme Court recognized, potentially raise serious questions regarding Article III jurisdiction." *Id.* (citing *Lamagno*, 515 U.S. at 437 (O'Connor, J., concurring) (noting a "difficult question of federal jurisdiction"); *id.* at 441 (Souter, J., dissenting) (noting a "serious problem" that "approach[es] the limit [of Article III 'Arising Under' jurisdiction], if it does not cross the line"). But, reasoned the D.C. Circuit, "[r]equiring remand to state court avoids these constitutional questions, while in no way undermining the purposes of the Westfall Act." *Haddon*, 68 F.3d at 1427.

b. To these constitutional considerations one can add the point that Congress expressly intended the Westfall Act to strike a balance: "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Westfall Act, § 2(b) ("Purpose"), 102 Stat. at 4564, *reprinted in* App. 27a. As the D.C. Circuit correctly observed, "[a]llowing federal courts to try garden-variety tort suits following a judicial determination that the federal employees acted *outside* the scope of employment would not serve Congress's [dual] objectives." *Haddon*, 68 F.3d at 1427. Moreover, as the First Circuit noted, "a remand is both more logical and efficient than a dismissal of the federal action." *Nasuti*, 906 F.2d at 814 n.17.

c. The foregoing decisions treated the remand issue in the context of certifications that were colorably authorized by the Westfall Act at the outset even if they were successfully challenged on later review in the district court. By

this we mean certifications that properly invoke the Act and properly remove cases to federal court, where the scope-of-employment question is subject to judicial review. In such a case, it could fairly be argued that although "[t]here may no longer be a federal question once the federal employee is resubstituted as defendant, . . . there *was* a nonfrivolous federal question . . . when the case was removed to federal court." *Lamagno*, 515 U.S. at 435 (plurality opinion). Thus, it could fairly be argued further that such a case "raises [a] question of substantive federal law at the very outset," and it therefore "clearly 'arises under' federal law, as that term is used in Art. III." *Id.* (quoting *Verlinden B.V.*, 461 U.S. at 493); *see also supra* pp. 9-10.

But consider a case where (as here) removal is predicated on an incident-denying certification. The only dispute for the district court to resolve is whether the incident did in fact occur, which is (by definition) a "pure issue of fact." *Crawford-El*, 523 U.S. at 589. In *Wood*, that factual issue was whether the defendant "spoke in a sexually suggestive manner to plaintiff" and also whether he did "proposition or otherwise make any sexual advances towards plaintiff." 995 F.2d at 1124. Here, the factual issue is whether "Haley influenced LBLA . . . to fire [petitioner] after she had a run-in with Haley." App. 3a. As discussed above, it is difficult to see how of any of these factual issues is a "nonfrivolous federal question," or a "question of substantive federal law," as those terms were used by the *Lamagno* plurality. Thus, unless this case and others of its kind are remanded to state court, Westfall Act litigation will indeed "cross the line" of Article III jurisdiction, as the *Lamagno* dissent warned.

d. Finally, we believe that it is instructive to consider the federal officer removal statute, 28 U.S.C. § 1442(a). As this Court reiterated in *Jefferson County v. Acker*, 527 U.S. 423 (1999), to qualify for removal under § 1442(a), the federal officer must "raise a colorable federal defense." *Id.* at 431 (citing *Mesa v. California*, 489 U.S. 121, 139 (1989)). In construing this requirement, the Court does "not require

the officer virtually to 'win his case before he can have it removed.'" *Id.* (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). In *Jefferson County* itself, the Court concluded that the defendant officers' intergovernmental tax immunity "argument, although we ultimately reject it, presents a colorable federal defense," *id.*, and therefore the Court held that "the case was *properly* removed under the federal officer removal statute," *id.* at 427 (emphasis added). In *Mesa*, by contrast, the removing defendants had "raise[d] no colorable claim of federal immunity or other federal defense," and so the Court affirmed a judgment remanding the case to state court. 489 U.S. at 124.

The Attorney General's Westfall Act certification that the defendant employee was acting within the scope of his employment is fairly analogized to the assertion of a colorable federal defense. The certification, like the federal defense, need not be "right"—in the sense of being resolved in the federal defendant's favor on subsequent judicial review—to make removal "proper." (This, petitioner, submits, is what 28 U.S.C. § 2679(d)(2) means in providing that a certification "shall *conclusively* establish scope of office or employment for purposes of removal").

On the other hand, just like a federal defense that is not even colorable, a certification that is not authorized by the Westfall Act—to wit, an incident-denying certification—cannot sustain removal. As in *Mesa*, such an action must be remanded to state court. The Court put it this way in a subsequent federal officer removal case:

> Having concluded that NIH *lacked authority to remove petitioners' suit to federal court*, we must determine whether the case should be remanded to state court. . . . Since the district court had no original jurisdiction over this case, . . . *a finding that removal was improper* deprives that court of subject matter jurisdiction and obliges a remand under the terms of [28 U.S.C.] § 1447(c).

International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72, 87 (1991) (unanimous) (emphasis added).

Therefore, the Court should also take up the second question presented and resolve the three-way split over the authority of a district courts to remand a Westfall Act case to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

III. This Case Is an Excellent Vehicle to Resolve the Long-Standing Splits in the Circuits.

1. The two circuit splits have existed for more than a decade. The split on the first question presented has existed since 1994, when the Third Circuit in *Melo* expressly disagreed with the First and Second Circuits in *Wood* and *McHugh*, respectively. *See supra* pp. 7-8. The split on the second question has existed even longer, with the First Circuit *ordering* remand to state court in 1990, followed by the Eleventh Circuit giving district courts *discretion* to remand in 1992. *See supra* pp. 13-14. The split between the four-Justice plurality and the four-Justice dissent in *Lamagno* has persisted since 1995. As this case illustrates, moreover, the two questions are recurring ones. *See also, e.g., Asto v. Mirandona*, 372 F. Supp. 2d 702, 707 (E.D.N.Y. 2005) ("The court must view the tortious conduct in the light most favorable to plaintiff, meaning that 'the government may not deny that acts were within the scope of employment by denying that the acts occurred.'" (quoting *McHugh*, 966 F.2d at 74)); *Allstate Insurance*, 254 F. Supp. 2d at 718-28 (S.D. Ohio 2002) (addressing the remand issue at great length); *Clamor*, 191 F. Supp. 2d at 1189-93 (D. Haw. 2002) (same).

2. The present case is an ideal vehicle to resolve the recurring questions. In the first place, it cleanly presents both questions. More importantly, the scope-of-employment issue is presented in its simplest and starkest form. There are no factual or legal disputes about immunity per se: the United States "conceded that if Haley induced [petitioner's]

firing, he acted outside the scope of his employment" with the U.S. Forest Service. App. 3a. Accordingly, the present case does not raise what the First Circuit in *Wood* called a potential "administrative problem" that can arise when the court confronts "the difference between denying facts that amount to a 'characterization' or 'description'" (which *Wood* permits the Attorney General to do) and "denying that any harm-causing incident occurred at all" (which is foreclosed by *Wood*). 995 F.2d at 1129-30.

This case provides the Court with a good opportunity to dispel the considerable "statutory fog" that has attended the Westfall Act for a great while. The Court should take that opportunity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 2005

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0381p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAT OSBORN, *Plaintiff-Appellee,* v. BARRY HALEY, *Defendant-Appellant (04-5716),* GAYE LUBER; LAND BETWEEN THE LAKES ASSOCIATION, INC., a Kentucky Corporate Contractor to the U.S. Forest Service, *Defendants-Appellants (04-5820).*	Nos. 04-5716/5820

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 03-00192—Thomas B. Russell, District Judge

Submitted: June 1, 2005

Decided and Filed: September 8, 2005

Before: MOORE and COOK, Circuit Judges;
GWIN, District Judge.*

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ON BRIEF: Peter R. Maier, Barbara L. Herwig, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., C. Thomas Miller, J. Duncan Pitchford, WHITLOW, ROBERTS, HOUSTON & STRAUB, Paducah, Kentucky, for Appellants. Pat Osborn, Murray, Kentucky, pro se.

OPINION

COOK, Circuit Judge. This decision confronts the procedural ramifications attendant to a Westfall Act certification that denies the occurrence of any injury-causing event and the jurisdictional consequences of a denial of substitution under the Act—issues that have split the circuits. We vacate the district court decision, ascribing instead to the view adopted by a majority of the other circuits to have considered these issues.

I

The Westfall Act, 28 U.S.C. § 2679, immunizes federal employees from liability for torts committed within the scope of their employment. The Act permits the United States to certify that a federal employee acted within the scope of his employment, remove such state-court action to federal court, and substitute itself as defendant in place of the targeted federal employee:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed . . . by the Attorney General to the district court of the United States . . . Such action or proceeding shall be

> deemed to be an action or proceeding brought against the United States . . . , and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. § 2679(d)(2) (2000).

The United States invoked its Westfall-Act authority in this case on behalf of Barry Haley, an employee of the Forest Service. Plaintiff Pat Osborn sued Haley in state court following her termination by her employer, Land Between the Lakes Association (LBLA). Osborne complained that Haley influenced LBLA, a contractor that provided services to the Forest Service, to fire her after she had a run-in with Haley. The Attorney General authorized certification that Haley had been acting within the scope of his employment at the time of the incident giving rise to Osborn's allegations. The United States then successfully removed the suit to federal court and filed a Notice of Proposed Substitution for the immune Haley, and a motion to dismiss for failure to state a claim.

In the district court, Osborn contested substitution, adamant that, notwithstanding the Attorney General's certification, Osborn's inducement of her discharge was extraneous to the proper scope of his duties. To prove her point, she submitted evidence that governing policies prohibited Forest Service employees like Haley from "participat[ing] in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees." In response, the United States conceded that if Haley induced Osborn's firing, he acted outside the scope of his employment. It denied, however, that Haley interfered with Osborn's continued employment.

The district court regarded the submissions of the parties as requiring a decision on the merits of Osborn's claim, *i.e.*, whether the alleged harm-causing incident occurred at

all, rather than consideration of the question it thought it should be reviewing—whether the *content* of the communications between LBLA and Haley was within his scope of employment. The district court thus decided it lacked authority to decide the scope question. It instead accepted as true Osborn's allegations that Haley induced her discharge, and from that premise resolved the scope-of-employment/immunity issue against Haley's entitlement to immunity. The court perforce denied substitution and, then, concluding that it lacked jurisdiction, remanded the action to state court.

II

We analyze Defendants' appeal as presenting two interpretive questions yet unanswered by existing circuit precedent: first, whether district courts evaluating a scope certification can resolve material disputes about the facts "upon which the plaintiff would predicate liability," or whether instead courts must accept the plaintiff's allegations of such "merits facts," *Melo v. Hafer*, 13 F.3d 736, 742-43 (3d Cir. 1994); and second, whether a federal court possesses the authority to remand if it ultimately finds substitution of the United States inappropriate. We begin with the first of the two questions.

A

It is well settled that the Attorney General's scope-of-employment certification may be judicially reviewed—a plaintiff may challenge the scope certification and expect resolution of that issue by the district court. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). But, as the district court rightly acknowledged in choosing the sister-circuit precedent it would follow, circuits disagree about the parameters of district courts' factfinding authority where, as here, the Attorney General's scope certification amounts to a denial that any wrongdoing occurred. In such cases, adjudicating the precondition—whether the incident occurred within the scope of employment—can only be accom-

plished by deciding whether the employee committed the wrong the plaintiff alleges. And that prospect has caused courts to question their authority under such circumstances.

Wood v. United States, 995 F.2d 1122 (1st Cir. 1993) (en banc), the First Circuit decision relied on by the district court, represents one approach to this certification scenario. The *Wood* majority took the position that the Westfall Act does not permit judicial factfinding where the Attorney General's certification essentially denies the plaintiff's central allegations of wrongdoing, but instead requires courts to accept as true the plaintiff's allegations (as the district court did here). The court acknowledged that the Act permits the Attorney General to dispute the plaintiff's *description* of the tortious incident alleged—"incident-characterizing facts"—and authorizes the district court to resolve such disputes. *Id.* at 1129. But, according to the court, "incident-denying" certifications require different treatment, largely because the Act's reference to the "time of the incident out of which the claim arose" assumes the existence of some kind of incident. *Id.* at 1124. Additionally, the court deemed restrictions on the court's factfinding authority in connection with incident-denying certifications necessary to preserve the jury's factfinding role. *Id.* at 1123, 1130.

Three judges dissented, insisting "the district court cannot proceed merely by assuming the complaint's allegations to be true and the certificate false." *Id.* at 1134. To the contrary, in their view, district courts must resolve all factual disputes relevant to whether the defendant acted within the scope of employment, including, when necessary, whether the defendant acted as the plaintiff alleges. *Id.* at 1133. The *Wood* dissenters discounted the en banc majority's interpretation of the statutory phrasing as necessarily assuming that an incident occurred. To them, "it is an accident of language—a reflection of the most common case—that the statute posits a 'happening.'" *Id.* at 1134. "Incident," they determined, "must encompass the possibility that something did not happen as well as the possibility

that it did." *Id.* Acknowledging some doubt regarding whether the jury or the judge should decide issues "common both to the validity of the certificate and to the merits of the controversy," the dissenters nonetheless concluded that the statutory language, Congress's policies, and relevant precedent support leaving that decision to the judge. *Id.* at 1134-37. The dissenting view found support in: the absence of language in the statute requiring the Attorney General or the court to accept the plaintiff's version of events; Congress's intent to spare employees for whom the Attorney General has issued a scope certification "not only from liability for misconduct related to their official duties but also from the burden and expense of defending such suits"; and Supreme Court precedent emphasizing that "immunity-related issues should be decided by the judge and at the earliest opportunity." *Id.* at 1135-36 (emphasis omitted). Additionally, from the standpoint of sound administration of the statute, the dissenters found untenable the majority's distinction between *characterization* of an incident and *denial* of an incident. The dissenters predicted that, "under the majority's approach, district courts—and ultimately [circuit courts]—will continue to engage in difficult, time-wasting controversies . . . about precisely *which facts* pertaining to the scope of employment issue are for the district judge and which are for the jury," resulting in the multiplication of "[h]air splitting distinctions and anomalous results." *Id.* at 1136.

The majority of circuit courts addressing the issue since *Wood* have adopted the dissenters' approach. In *Kimbro v. Velten*, 30 F.3d 1501, 1508 (D.C. Cir. 1994), for example, the D.C. Circuit, echoing the dissenters' reasoning, concluded: "it does not matter . . . what the certification actually says —*i.e.*, whether it denies or recharacterizes the plaintiff's allegations of the employee defendant's conduct; its filing simply ensures that a federal court determine whether the employee is entitled to absolute immunity." Comparing the Attorney-General-certification provision with another provision of the Westfall Act, § 2679(d)(3), which entitles a de-

fendant to a scope determination even absent an Attorney General's scope certification, the court reasoned, "Congress certainly could not possibly have intended an employee, whose conduct the Attorney General declined to certify, to have greater immunity protection than one who enjoyed an Attorney General's certification." *Id.*

Likewise, in *Melo v. Hafer*, the Third Circuit, after reviewing the legislative history and language of the statute and considering *Wood*, "respectfully disagree[d] with the *Wood* court." 13 F.3d at 746. The *Melo* court found "nothing in the text or legislative history of the Act suggesting that Congress intended to restrict district courts to the facts alleged in the plaintiff's complaint when deciding substitution motions." *Id.* The court found "[a] fortiori, . . . nothing there suggesting that district courts be limited to the 'core' facts alleged but not the 'descriptive' ones." *Id.* Moreover, given congressional approval of pre-Westfall Act summary-judgment practice—reflected in the legislative history—the court "decline[d] to attribute to Congress an intent to make pre-trial substitution less available to a defendant employee than was a summary judgment on grounds of immunity under pre-Westfall practice." *Id.* The court thus concluded "that the Attorney General may file a certification under [the Westfall Act] whenever he or she concludes that an employee defendant was acting within the scope of his or her employment at the relevant time or times," even if "the plaintiff alleges conduct which is beyond the scope of the defendant's employment, but which the Attorney General determines did not occur." *Id.* at 747.

Other decisions too expressly or impliedly reject the *Wood* majority's approach. *See Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996) (finding the *Wood* majority's approach "contrary to the language of the Westfall Act," and agreeing with the *Wood* dissenters that "nothing in the Westfall Act gives the district court the authority to refuse to substitute the United States on the ground that either the government or the employee denies the offensive conduct").

Though this court has not yet directly addressed this issue, it noted in *Singleton v. United States* that "when a district court is reviewing a certification question under the Westfall Act, it must identify and resolve disputed issues of fact necessary to its decision before entering its order." 277 F.3d 864, 870 (6th Cir. 2002) (internal quotations and citations omitted). The panel cited *Heuton*, *Melo*, and *Kimbro* for this proposition.

We join the majority of the circuits addressing the issue in holding that where the Attorney General's certification "is based on a different understanding of the facts than is reflected in the complaint," *Melo*, 13 F.3d at 747, including a denial of the harm-causing incident, the district court must resolve the factual dispute. In our view, this reading of the Westfall Act observes the language and purpose of the Act, effectuates congressional policy, and accounts for administrative practicalities. We thus conclude that the district court erred in relying on the First Circuit's decision in *Wood* and in denying substitution without first determining the scope-of-employment issue.

B

Defendants additionally argue that even if the district court correctly denied the United States' motion to substitute, it erred in remanding the case to state court. Again pointing to a circuit split, Defendants urge us to adopt the majority view and interpret the Westfall Act as requiring the exercise of federal jurisdiction upon Attorney General certification, even where the district court ultimately denies substitution.

The Westfall Act provides that "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). In a footnote, our *Singleton* case suggested that the "conclusively" language should be read literally. The panel noted:

> [A] plaintiff suing a federal employee may not challenge the government's removal of the case to federal court, but, once in federal court, the plaintiff may challenge the government's substitution of itself as defendant. . . . If the district court finds that the federal employee was not acting in the scope of employment and therefore that substitution is inappropriate, the district court retains jurisdiction over the case and assesses the claims pursuant to state tort law.

277 F.3d at 870 n 5. *See also Wolverton v. United States*, No. 96-5224, 1997 WL 85153, at *2 (6th Cir. Feb. 26, 1997) ("Unlike a certification for removal . . . a certification for substitution . . . is not automatically conclusive.").

This interpretation attracted four of the five Supreme Court justices joining the majority opinion in *Lamagno*. In concluding that a district court retains jurisdiction under the Westfall Act even if it ultimately refuses to substitute the United States as a defendant, those justices reasoned: "Whether the employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. . . . Because a case under the Westfall Act thus raises a question of substantive federal law at the very outset, it clearly arises under federal law, as that term is used in Art. III." 515 U.S. at 435 (internal quotations, alterations, and citations omitted).[1]

Several circuit court opinions agree with the four-justice *Lamagno* interpretation. *See, e.g., Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000) ("Because § 2679(d) 'conclusively' vests federal jurisdiction over a suit against a federal employee who the Attorney General has

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[1] Justice O'Connor expressed no opinion on the issue, but, objecting to the court's resolution of an issue not presented in the case before it, declined to join the majority opinion on this point. 515 U.S. at 437 (O'Connor, J., concurring).

certified 'was acting within the scope of his office or employment,' a district court has no authority to remand a case removed pursuant to that section, and the bar of § 1447(d) does not preclude us from reviewing a remand order when the district court exceeds its authority."); *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996) (analyzing the language of the statute, the opinions in *Lamagno*, and decisions in other circuits and concluding that "upon rejection of the Attorney General's certification, the district court retains jurisdiction and may not remand the action to state court"); *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir. 1993) ("From [the Westfall Act's] statutory scheme, we conclude that when a tort suit against a federal employee is filed in state court and the Attorney General certifies that the employee was acting within the scope of the employee's office or employment and removes the case, the district court has no authority to remand the case on the ground that the Attorney General's certification was erroneous. We believe that this conclusion is dictated by the plain language of the [Westfall Act] stating that the Attorney General's certification 'shall *conclusively* establish scope of office or employment *for purposes of removal*.' "). *But see Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995) (requiring remand where the federal court finds the Attorney General's certification erroneous, reasoning that such a conclusion avoids difficult constitutional questions without undermining the purposes of the Westfall Act and prevents "federal courts [from trying] garden-variety tort suits following a judicial determination that the federal employees acted *outside* the scope of employment"); *Nasuti v. Scannell*, 906 F.2d 802, 814 n.17 (1st Cir. 1990) ("We imply power to enter a remand order (should scope not be found) from the analogous authorization in section 2679(d)(3), and from the fact that a remand is both more logical and efficient than a dismissal of the federal action.").

We agree with the majority view that the clear language of the Act forecloses remand. We thus also agree with Defendants that the district court lacked authority to remand the action.

III

Finding Defendants' arguments well taken, we vacate the district court's denial-of-substitution and remand orders. On remand the district court shall resolve the factual disputes underlying the scope question, including whether the alleged incident occurred. Even if the district court finds that Haley acted outside the scope of his employment, it must nonetheless retain jurisdiction over this case.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:03CV-192-R

PAT OSBORN,

PLAINTIFF

v.

BARRY HALEY, et al.

DEFENDANTS

ORDER

This matter is before the Court on the United States's motion for reconsideration (Dkt #22). Motions to reconsider under Fed. R. Civ. P. 59(e) are granted "if there is a clear error of law, see *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); newly discovered evidence, see *id.*, an intervening change in controlling law, *Collision v. International Chemical Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n.3 (1st Cir. 1993); *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), or to prevent manifest injustice. *Davis v. Jellico Community Hospital*, 912 F.2d 129, 133 (6th Cir. 1990); *Collision*, 34 F.3d, at 236; *Hayes*, 8 F.3d, at 90-91 n.3." *Gencorp, Inc. v. American International Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). "A motion under Rule 59(e) is not an opportunity to re-argue a case," and the movant must "clearly establish a manifest error of law or must present newly discovered evidence." *Sault Ste. Marie Tribe*, 146 F.3d, at 374 (citing *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992)). Parties are not to use them to raise

arguments which could, and should, have been made before judgment issued." *Id.* Finally, to "constitute 'newly discovered evidence,' the evidence must have been previously unavailable." *Gencorp*, 178 F.3d, at 384 (citing *ACandS*, 5 F.3d, at 1263; *Javetz v. Board of Control, Grand Valley State University*, 903 F. Supp. 1181, 1191 (W.D. Mich. 1995) (and cases cited therein); Charles A. Wright, 11 Federal Practice and Procedure § 2810.1, at 127-28 (1995)). *See also Global Network Technologies, Inc. v. Regional Airport Authority of Louisville and Jefferson County*, 122 F.3d 661, 665-66 (8th Cir. 1997) ("a Rule 59(e) motion may not be used to introduce new evidence that could have been introduced during the pendency of the summary judgment motion").

The United States has presented new evidence (albeit evidence previously available) in the form of declarations from Mr. Haley and Ms. (Luber) Gieselman, but has not pointed to any change in controlling Sixth Circuit law—or the creation thereof. Its motion rests mainly on the contention that this Court committed a clear error of law in its original disposition of the case. *See Engler, supra.* This clear error is based on this Court's decision to overrule the Attorney General's certification that Mr. Haley acted within the scope of his employment if and when he took actions alleged in Ms. Osborn's complaint, or, in the alternative, on this Court's failure to hold an evidentiary hearing to determine whether Mr. Haley in fact took those actions.

The question now, as before, is how this Court is to settle the dispute between Ms. Osborn on one hand, and Mr. Haley and Ms. Gieselman on the other, about to what extent, if any, Ms. Osborn's complaint to the Department of Labor played a role in her dismissal. Mr. Haley and Ms. Gieselman assert that it played no role at all because Ms. Gieselman did not know about it and she and Mr. Haley did not discuss it.

One complicating factor is that Mr. Haley has signed a declaration stating that he had no communication with

Ms. Gieselman regarding the decision to fire Ms. Osborn. Therefore, it is highly unlikely, this Court would assume, that facts could develop during any type of discovery that would demonstrate that Mr. Haley "interacted" with Ms. Gieselman "regarding [Ms. Osborn's employment and] and any job-related problems that could have contributed to Ms. Osborn's firing." Mr. Haley has made legal arguments in the alternative hoping to preserve the United States's certification. This Court will not credit, however, factual arguments made in the alternative when one version is made under oath subject to perjury, i.e., Mr. Haley's declaration, and the other version merely suggested. Therefore, this Court must assume that the discovery would ultimately force it to decide between the basic question of whether the communication between Mr. Haley and Ms. Gieselman occurred or not, and whether it impacted Ms. Gieselman's decision to fire Ms. Osborn, and not about whether the content of the communication was within the scope of Mr. Haley's employment.

There is a dispute among the circuits—which the Sixth Circuit has not yet addressed—about how courts should deal with Westfall Act certifications based on an argument that no harm-causing incident ever took place. The First Circuit, in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993), per then-Chief Judge (now Justice) Breyer, reviewed federal employee immunity from common law torts, the Westfall Act's text, and its legislative history, and found that "the [Attorney General's certification] cannot deny the occurrence of the basic incident charged." *Id.* at 1124. The First Circuit concluded that permitting "a Westfall Act certificate simply to deny that anything occurred would extend a form of this immunity well outside the 'respondeat superior' context to 'egregious' torts allegedly committed at work. It would permit, to a significant degree, the Attorney General and district judge (rather than the jury) to decide whether allegations of such non-work-related torts were true or false." *Id.* at 1128.

The D.C. Circuit, in *Kimbro v. Velten*, 30 F.3d 1501 (C.A.D.C. 1994), disagreed with the First Circuit's conclusion. In *Kimbro*, the D.C. Circuit faced a lawsuit by one employee of the Department of Veteran Affairs against another employee for assault and battery. The victim, Ms. Kimbro, alleged that her fellow employee had "viciously struck [her] on the right arm" and assaulted her to prevent her from making a copy of her assailant's time card. *Id.* at 1502. The district court "did not decide whether [the assailant] had been acting within the scope of employment (or whether an assault had, in fact, occurred). Instead, the [district] court reasoned that if the assault had occurred, it could not be within the scope of employment, and if the assault did not occur (of course), no tort took place. Under either scenario, the FTCA was not implicated." *Id.* The D.C. Circuit rejected the First Circuit's analysis in *Wood* (and the district court's reasoning in the decision on appeal) and concluded that the district courts must, if necessary, resolve the merits of the underlying dispute, i.e., whether or not the harm-causing incident took place, even if doing so ousts Ms. Osborn's right to a trial by jury. *Id.* at 1508-10.[1] *See also generally Melo v. Hafer*, 13 F.3d 736 (3d Cir. 1994) (adopting the approach advocated by the dissenters in *Wood* and by *Kimbro*).

This Court concludes that the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications, and that in any event the United States has not demonstrated that this Court's earlier opinion committed a "clear error of law." Therefore, the United States's motion to reconsider is **DENIED**. The United States's motion to stay remand of the case is **DENIED AS MOOT**.

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[1] The *Kimbro* court addresses plaintiffs' Seventh Amendment rights by noting "that under this statute Kimbro's claim is deemed an action against the United States—unless and until she establishes that Velten was acting outside her scope of employment—and the Seventh Amendment does not apply to actions against the United States." 30 F.3d at 1509 n.4.

IT IS SO ORDERED.

This is the 13 day of May, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel

ENTERED

MAY 13 2004

JEFFREY A. APPERSON, CLERK
BY [Manual signature]
DEPUTY CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:03CV-192-R

PAT OSBORN,

PLAINTIFF

v.

BARRY HALEY, GAYLE LUBER,
and LAND BETWEEN THE LAKES
ASSOC., INC.

DEFENDANTS

ORDER

For the reasons given in the accompanying opinion, this Court finds that Mr. Haley's alleged actions occurred outside the scope of his employment with the United States Forest Service. In light of this conclusion, **IT IS ORDERED** that

the United States's motion to dismiss (Dkt #13) is **DENIED**;

the United States's declaration of substitution and/or certification is **OVERRULED**;

Mr. Barry Haley shall continue to be a party defendant in his individual capacity; and

this case is **REMANDED** to Trigg County Circuit Court.

This is the 10 day of March, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel

ENTERED

MAR 12 2004

JEFFREY A. APPERSON, CLERK
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DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:03CV-192-R

PAT OSBORN,

PLAINTIFF

v.

BARRY HALEY, GAYLE LUBER,
and LAND BETWEEN THE LAKES
ASSOC., INC.

DEFENDANTS

MEMORANDUM AND ORDER

The United States has moved to intervene in this case and substitute itself as the party-in-interest for Mr. Barry Haley, a United States Forest Service employee originally sued in his individual capacity (Dkt #11). The United States subsequently moved to dismiss this case (Dkt #13) on the grounds that Ms. Osborn has failed to exhaust her administrative remedies under the Federal Tort Claims Act and that as a result the United States as sovereign has not acquiesced to this suit. Ms. Osborn has responded (Dkt #15) and the United States replied (Dkt #17), and the matter is now ripe for decision.

The United States's motion to dismiss hinges on the appropriateness of its motion to substitute itself for Mr. Haley. If the United States is the appropriate party, then the case must be dismissed. If the United States's attempted substitution is improper, then there is no cause for dismissal. For the reasons given below, this Court concludes

that the United States is not a proper party to this action and therefore its notice of substitution and certification (Dkt #11) is **OVERRULED** and its motion to dismiss (Dkt #13) is **DENIED**. This Court shall treat Ms. Osborn's response as in part a motion to return Mr. Haley, in his individual capacity, as a party to this matter; that motion is **GRANTED**.

Finally, the absence of the United States as a party to this case destroys this Court's jurisdiction. Therefore, this Court may not consider LBLA and Ms. Luber's motion to dismiss, and this case must be returned to state court.

BACKGROUND

Ms. Osborn worked for a private company, Land Between the Lake Association, as a volunteer coordinator between January 2001 and June 2002. While employed by LBLA, Ms. Osborn applied for a job with the Forest Service. Ms. Osborn, who is entitled to a five-point veteran-hiring preference, did not receive the job. Mr. Haley was the Forest Service employee who was apparently in charge of the hiring process.

When Mr. Haley announced that he had given the job to someone else at a meeting with LBLA employees on May 20, 2002, Ms. Osborn questioned his failure to inform her before the meeting started, and subsequently made a joke at his expense about the use of a suggestion box system. During the next week Ms. Osborn's supervisor, Ms. Newkum, told her to apologize to Mr. Haley, but Ms. Osborn refused.

On June 11, Ms. Osborn then filed a complaint with the United States Department of Labor asking that it investigate whether or not she received appropriate consideration for her veterans' preference. The Department's investigator, Robert Kuenzli, spoke with Mr. Haley on June 17 and concluded after reviewing the hiring procedure that "the posting was handled correctly." Mr. Kuenzli informed Ms. Osborn of this, who then asked that he close her complaint.

On June 17, after Mr. Haley spoke with Mr. Kuenzli, the LBLA's executive director—Gayle Luber—demanded that Ms. Osborn apologize to Mr. Haley. Ms. Osborn refused, and was fired from the LBLA on June 19.

Ms. Osborn filed a complaint in state court alleging four causes of action: 1) discharge in violation of public policy [against LBLA and Gayle Luber]; 2) interference with employment relationship [against Mr. Haley]; conspiracy for wrongful discharge [against all the defendants]; and 4) conspiracy to interfere with an employment relationship [against all the defendants].

ANALYSIS

1. Is the United States a proper party to this case?

This Court must review the United States's certification that the alleged torts occurred within the scope of Mr. Haley's employment, although that certification is entitled to substantial deference. *See, e.g., Gutierrez de Martinez v. Lamagno,* 515 U.S. 417 (1995). Scope of employment questions are determined by state law. *Williams v. United States,* 350 U.S. 857 (1955); *see also Flechsig v. United States,* 991 F.2d 300, 302 (6th Cir. 1993). As a sister district court explained:

> When challenging a certification decision, a plaintiff must present evidence from which a District Court reasonably could find that the original defendant-employee acted outside the scope of his employment. As noted above, certification serves as prima facie evidence that an employee acted within the scope of his employment. Therefore, if the United States substitutes itself as the defendant and moves to dismiss, a plaintiff cannot defeat the motion merely by relying upon the factual allegations in his complaint. A plaintiff may defeat a motion to dismiss, however, by providing the District Court with evidence that raises

> a genuine issue of material fact on the scope-of-employment issue.

Gilbar v. United States, 108 F. Supp. 2d 812, 816-17 (S.D. Ohio 1999).

Here, however, the United States does not deny any of the factual allegations contained in Ms. Osborn's complaint, i.e., that Mr. Haley talked with Ms. Luber regarding Ms. Osborn's complaint to the Department of Labor. Instead, the United States only disputes her legal conclusion that Mr. Haley was acting in his individual capacity during the relevant times. *See* Dkt #11 at ¶ 2, 4.[1] Thus, an evidentiary hearing is not needed. *See Rutkofske v. Norman,* 114 F.3d 1188, 1997 WL 299382 at *4 (6th Cir. June 4, 1997) ("The other courts that have addressed the issue have also concluded that a factual hearing concerning removal under the Westfall Act is necessary only if there is conflicting evidence as to a material fact.").

Here, Ms. Osborn submitted with her response to the United States's motion to dismiss two additional pieces of evidence supporting her argument that Mr. Haley acted outside the scope of his employment. The first evidence was a memorandum of understanding between the Forest Service and LBLA. The second piece of evidence was a letter from the Department of Labor's investigator detailing his involvement with this matter.

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[1] The two instances are:

> Plaintiff alleges that Barry Haley was employed by the United States Forest Service "at all times relevant to this complaint . . . ." Complaint at paragraph 6. (Dkt #11 at ¶ 2)

> Monica Wheatley, Acting United States Attorney for the Western District of Kentucky, United States Department of Justice, certified that at the time of the conduct alleged, the individually named defendant was acting within the scope of his employment as an officer and/or agent of the United States Forest Service. (Dkt #11 at ¶ 4)

Ms. Osborn has alleged that the defendants committed four intentional torts. Ordinarily, under Kentucky law, intentional torts fall outside the scope of a person's employment unless they are undertaken with a "purpose to serve the employer." *See, e.g., American General Life & Accident Ins. Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2003). Under Kentucky law, this Court must ask four questions to determine whether or not Mr. Haley acted within the scope of his employment. First, is the conduct similar to Mr. Haley's ordinary course of duties? Second, did Mr. Haley's actions occur within the "spacial and temporal limits" of his work? Third, were these actions taken to further the Forest Service's goals? And fourth, was the conduct foreseeable? *See Booker v. GTE.net LLC*, 350 F.3d 515, 518-19 (6th Cir. 2003).

Mr. Haley's alleged conduct, if proven true,[2] does not fall within the scope of his employment with the Forest Service. First, the Memorandum of Understanding between the Forest Service and LBLA clearly states that USFS employees will not participate in the "hiring or firing [of] LBLA employees." Therefore, any interaction Mr. Haley might have had regarding Ms. Osborn's employment was out of the scope of his duties with the Forest Service. Second, there is no indication—or even argument—that any of Mr. Haley's actions, if proven, furthered the Forest Service's goals. Third, there is no indication that this conduct should have been a foreseeable result of Mr. Haley's employment, Forest Service policies, or Ms. Osborn's actions.

Mr. Haley argues that Ms. Osborn has "alleged no facts to support an inference that Haley even attempted to affect her employment." This argument is more appropriate for a motion to dismiss than it is for any discussion of certification. And, in light of liberal pleading standards, it is not persuasive. Under Kentucky law, the close proximity be-

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[2] It is important to note that Ms. Osborn need not provide additional proof of an undisputed fact absent any challenge to those facts by the United States.

tween Ms. Osborn's request that the Department of Labor investigate her job application, Mr. Kuenzli's call to Mr. Haley, and Ms. Luber's subsequent demand for apologies is enough to raise that inference. *See, e.g., Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 135-36 (Ky. 2003) ("Circumstantial evidence of a causal connection is 'evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action' " and "a close temporal proximity alone may be sufficient to raise the inference.") (citations omitted).

Ms. Osborn has adequately alleged conduct on Mr. Haley's part that, if proven, would give rise to tort claims under Kentucky state law and that fall outside the scope of his employment with the United States Forest Service. At this stage, this Court must accept her allegations as true absent argument otherwise. Therefore, it concludes that Mr. Haley's alleged actions occurred outside the scope of his employment with the United States Forest Service and that the Untied States's certification is inappropriate and its motion to dismiss should be denied.

2. Does this Court have jurisdiction?

Having concluded that the United States is not a proper party to this case, this Court must now determine whether or not it has jurisdiction. The Sixth Circuit has not spoken to this issue and the authority among other circuits is split. *See Allstate Ins. Co. v. Quick*, 254 F. Supp. 2d 706, 718-28 (S.D. Ohio 2002). After conducting a thorough analysis of the relevant statutes and caselaw, Chief Judge Rice in *Allstate* concluded that "28 U.S.C. § 2679(d)(2) does not bar this Court from remanding an intentional tort action against a federal employee after it has been determined that the employee was not acting within the scope of her employment." *Id.* at 729. This Court agrees with Judge Rice's conclusion and adopts the reasoning set forth in *Allstate* that "remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c), which states, in part: 'If at any time be-

fore final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.'" *Id.* at 725. This conclusion is consistent with this Court's general authority to only hear cases where it has jurisdiction based on diversity or subject matter. Because the United States is not before this Court, and federal laws are not at issue, there is no subject matter [sic] jurisdiction. Because all the parties are citizens of Kentucky, there is no diversity jurisdiction. Therefore, this Court has no jurisdiction over this case and it must be remanded to the Trigg County Circuit Court.

An appropriate order shall follow.

This is the 10 day of March, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel
United States Attorney
Ms. Osborn

ENTERED

MAR 12 2004

JEFFREY A. APPERSON, CLERK
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APPENDIX E

[102 Stat. 4563]

PUBLIC LAW 100-694—NOV. 18, 1988

Public Law 100-694
100th Congress
[H.R. 4612]

An Act

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in *Westfall v. Erwin*, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in *Westfall v. Erwin*, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

[102 Stat. 4564]

(b) PURPOSE.—It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

* * * *

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

"With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.".

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

"(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

"(A) which is brought for a violation of the Constitution of the United States, or

"(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment **[102 Stat. 4565]** at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the

United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

"(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

"(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

* * * *